

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAWAN TYNER,

Defendant-Appellee.

UNPUBLISHED

June 5, 2014

No. 309729

Wayne Circuit Court

LC No. 06-007375-FC

Before: M.J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

The prosecution appeals as on leave granted¹ the order granting defendant a new trial in this case involving defendant's postconviction motion for relief from judgment based on newly discovered evidence. We reverse.

I. BASIC FACTS

Defendant was convicted after a jury trial for second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

This case arises from an October 25, 2005, shooting that occurred in Detroit, Michigan. At 12:30 a.m., Corey Riddick drove into the parking lot near the apartment of Angela McCullough, the mother of his child, at the McDonald Square complex in Detroit. It was dark outside, and the parking lot was dimly illuminated. Riddick testified that he previously had "some problems" with some individuals who lived in the area, and that as he drove halfway into the lot, he saw a gold Explorer and recognized it as the truck that had followed him and

¹ On November 1, 2012, this Court entered an order peremptorily reversing the trial court's order granting a new trial. *People v Tyner*, unpublished order of the Court of Appeals, entered November 1, 2012 (Docket No. 309729). On May 29, 2013, the Michigan Supreme Court vacated this Court's order and remanded the case to this Court for plenary consideration. *People v Tyner*, 494 Mich 859; 830 NW2d 772 (2013).

“chase[d] [him] down” before. On prior occasions, when Riddick encountered the Explorer, defendant, Carlos Strong, and several other male individuals were in the truck.

When Riddick saw the Explorer on this occasion, he immediately put his vehicle in reverse to get away. As he did so, he saw the driver’s door of the Explorer open, Strong exit the vehicle with a gun in his hand, and Strong shoot multiple times at Riddick’s vehicle. After backing up a bit, Riddick also saw the passenger of the Explorer fire at least one shot. Riddick identified defendant as that passenger. Although he only saw them for several seconds, Riddick was only 8 to 10 feet away from them, and he testified he was able to see and identify the driver’s and passenger’s faces because of the interior light in the Explorer that turned on when the driver’s door opened. Riddick had previously seen defendant both when the Explorer had followed him and during another daytime shooting that took place a week or two earlier. Riddick also saw a third individual in the backseat of the Explorer. Riddick estimated that a total of 9 to 12 shots were fired at his vehicle that night.

None of the bullets fired hit Riddick, but McCullough, who was in the front passenger seat of his vehicle, suffered a single gunshot wound to the abdomen and died from this injury.

Just a few hours after the shooting, Riddick gave a statement to the police and told them that the shooters were “Carlos and Juan [sic].”² Two days later, on October 27, 2005, Riddick recognized photographs of both Strong and defendant. There is some confusion, however, regarding how these photo identifications took place. Riddick testified that when he identified defendant, he was shown three photographs. Riddick testified that he “coulda’ been wrong” in his identification, and on cross-examination, Riddick was challenged on this admission. While admitting that he could have been wrong, he explained, “I just went with who I felt I saw, that I know that I saw.” Fisher testified that he never produced or presented any kind of photo array to Riddick. Instead, Fisher explained that because he was convinced that Riddick was familiar with both Strong and defendant (because of Riddick’s ongoing “beef” with them), he showed Riddick a single photo of Strong and a single photo of defendant. Fisher testified that Riddick was absolutely positive that the one photo was Strong and the other photo was defendant.

After defendant was convicted,³ he filed a motion for relief from judgment on November 25, 2009. Defendant requested a new trial based, in part, on newly discovered evidence that ostensibly established his innocence. Defendant claimed that Strong’s mother, Carol Turner, would testify that Strong admitted to her that he was involved in the crime and that defendant was not. On April 16, 2010, the trial court entered an opinion and order denying defendant’s motion. In its opinion, the trial court found that defendant “has not submitted any evidence in

² The trial transcript reflected “Juan,” but that pronunciation is indistinguishable from “Wan,” which could be short for defendant’s name, “Dawan.”

³ Strong was never brought to trial because he died from an accidental drowning out of state before he was able to be apprehended.

support of his contention”⁴ regarding Turner’s testimony. Further, the trial court concluded that the evidence would not have made a different result probable.

On November 9, 2011, this Court vacated the trial court’s order denying defendant’s motion for relief from judgment and remanded the case to the trial court for an evidentiary hearing regarding defendant’s claim of newly discovered evidence.⁵ *People v Tyner*, unpublished order of the Court of Appeals, entered November 9, 2011 (Docket No. 303625).

On remand, the prosecution argued that the affidavits submitted by defendant were not credible or reliable and did not support the conclusion that defendant would probably be acquitted on retrial. The prosecution argued that Strong’s statement to Turner would not be admissible because it was not against his penal interest as it was made to his mother. The prosecution further argued that the admission was not trustworthy because Strong did not state why the vehicle was shot at and Turner delayed in coming forward. The prosecution also argued that Rasheeda Pearson’s affidavit lacked credibility and reliability because she waited to come forward, she did not witness the shooting, her statement would be double hearsay, and her testimony would be speculative.

The evidentiary hearing was held on January 17, 2012. Turner testified that her son, Strong, died on June 8, 2007, in a drowning accident in Ohio. Defendant was Strong’s very close friend; they had attended middle school and high school together. Turner also knew McCullough because she went to middle school with Strong and defendant and lived in the same complex as Strong. On the night of McCullough’s death, Turner’s nephew called her at approximately 3:00 a.m. and said he thought Strong had something to do with McCullough being murdered that night. Turner tried to call Strong’s cell phone, but he did not answer. Strong eventually called her back at approximately 4:00 a.m.; Strong was emotional, crying, and sad because McCullough had been shot. Turner testified, “He said that Angela got shot, and that he didn’t know that she was in the car, and that she has kids.” Strong said he would call Turner right back, but he did not.

In November 2005, near Thanksgiving, Strong called Turner again. Turner testified that Strong was upset and crying again when he stated, “Dawan got arrested, and he wasn’t even with us.” Turner asked who was with him and Strong said, “It was three other guys, but Dawan wasn’t one of ‘em. Dawan wasn’t with us that night.” Turner asked again who was with him, and Strong said he would call her back, but he never did. Turner testified that Strong never said he did the shooting, but she knew that he was there.

⁴ Our review of the lower court record reveals that defendant never submitted any other materials, such as any affidavits, to support his claim.

⁵ , Defendant attached the affidavits of his proposed witnesses, Carol Turner (Strong’s mother) and Rasheeda Pearson (mother of Strong’s daughter), to his application for leave to appeal to this Court.

Turner also spoke to Strong in February 2007. Turner testified that Strong was crying when he called and stated, “Dawan got convicted, and he had nothin’ to do with it.” Strong also said that he did not know what to do and that he should have “stepped up sooner,” but it was now too late.

Pearson and Strong have a daughter together. Pearson also knew defendant because he was Strong’s best friend. Pearson testified at the evidentiary hearing that she was home at the time of the October 25, 2005, shooting and that it occurred “right outside [her] front door.” During the late/early hours of October 24/October 25, Pearson left her home and walked to another neighbor’s home to borrow a plunger. While walking to her neighbor’s place, she passed within “a few feet” of Strong’s Explorer and saw three men sitting in it. Pearson recognized the men in the vehicle because they were her friends. Berry Trent Matthews was in the front passenger seat, and Elon Almond and Blake Dixon were in the backseat; defendant was not present, and there was no one in the driver’s seat. When Pearson got to the neighbor’s apartment, she saw that Strong was there. After getting the plunger, Pearson returned to her apartment.

Approximately 30 minutes later, Pearson heard several gunshots that sounded as if they were right outside her door. Pearson called Strong’s cell phone, but there was no answer initially. Eventually, Strong answered the phone and told Pearson, “Baby, I think I f***ed up our lives. I gotta’ call my mama.”

On March 1, 2012, the trial court found that Strong’s statements to Turner on the night of the shooting and around the time of defendant’s arrest and Strong’s statement to Pearson were admissible as excited utterances. The trial court also found that Strong’s statements to Turner after defendant was convicted were not admissible as excited utterances and that Pearson’s observations on the evening of the shooting were not newly discovered evidence because Pearson had an opportunity to come forward earlier. The trial court then asked the parties to brief whether the statements would make a different result probable on retrial and whether any statements were statements against penal interest.

On April 12, 2012, the trial court ruled that none of Strong’s statements qualified as a statement against penal interest. Nevertheless, based solely on the excited utterances, the trial court granted defendant a new trial. The trial court, however, did not explicitly articulate why the admission of the excited utterances on retrial would result in a different outcome.

On April 18, 2012, the prosecution filed an application for leave to appeal with this Court. On November 1, 2012, in lieu of granting leave to appeal, this Court entered an order peremptorily reversing the trial court’s order. *People v Tyner*, unpublished order of the Court of Appeals, entered November 1, 2012 (Docket No. 309729). This Court found that the evidence proffered by defendant would not make a different result probable on retrial. *Id.*

On February 5, 2012, defendant filed an application for leave to appeal to the Supreme Court. On May 29, 2012, the Supreme Court entered an order vacating this Court’s November 1, 2012, order and remanding the case to this Court for plenary consideration. *People v Tyner*, 494 Mich 859; 830 NW2d 772 (2013).

II. ANALYSIS

The prosecution contends that the trial court erred in granting defendant a new trial based on newly discovered evidence. We agree.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *Id.* at 559 (citations omitted). A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

In order to receive a new trial based on newly discovered evidence, a defendant must show that

"(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." [*People v Grissom*, 492 Mich 296, 313; 821 NW2d 50 (2012), quoting *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).]

In order to entitle a defendant to a new trial, the evidence must also be admissible. See *People v Darden*, 230 Mich App 597, 606; 585 NW2d 27 (1998).

The trial court found that three statements Strong made would be admissible as excited utterances. We note that even though the trial court granted defendant's motion for a new trial based on these statements, it never made any explicit findings related to the fourth requirement under *Grissom* and *Cress*, i.e., whether these statements would make a different result probable on retrial. Nevertheless, the trial court during the proceedings noted that this was a requirement that had to be satisfied before it could grant a new trial. As a result, in lieu of remanding for further factual findings, we will review the issue with the understanding that the trial court implicitly found that all four *Grissom/Cress* requirements were satisfied.

Generally, hearsay is inadmissible unless it falls within the requirements of one of the hearsay exceptions set forth in the Michigan Rules of Evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). MRE 803(2) lists "excited utterances" as an exception to being inadmissible by the hearsay rule. An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2). The requirements for a statement to constitute an excited utterance are "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Plus, the statement "must relate to the circumstances of the startling occasion." *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988); see also *People v Kowalak (On Remand)*, 215 Mich App 554, 557; 546 NW2d 681 (1996). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited

utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection.” *Smith*, 456 Mich at 551. The key inquiry is whether the declarant “was still under the influence of an overwhelming emotional condition” at the time the statement was made. *Straight*, 430 Mich at 425.

A. STATEMENT ONE

The first statement that the trial court found to be admissible as an excited utterance was Strong’s statement to his mother, Turner, on the night of the shooting. Strong told Turner, that he had “gotten into it with a guy, and it was a shoot-out,” and he did not know that McCullough was in the car with this other person. According to Turner, “[Strong] said that Angela got shot, and that he didn’t know that she was in the car, and that she has kids.”

The prosecution concedes that this statement is admissible as an excited utterance. However, the prosecution argues that the admission of this statement would not make a different result probable on retrial because Strong’s statements did not exonerate defendant. We agree. The trial court clearly erred in finding that the admission of this statement would make a different result probable on retrial. Strong’s statement reveals only that he was involved in the shooting, which is consistent with Riddick’s testimony. Strong’s statements do nothing to exonerate defendant because they do not indicate that defendant was not present or involved in the shooting.

B. STATEMENT TWO

The trial court also found that Strong’s statement to Turner around the time of defendant’s arrest was admissible as an excited utterance. Turner testified that when Strong called her, he was upset and crying when he stated, “Dawan got arrested, and he wasn’t even with us. . . . It was three other guys, but Dawn wasn’t one of ‘em. Dawan wasn’t with us that night.”

The prosecution argues that Strong’s statements to Turner around the time of defendant’s arrest do not constitute excited utterances because it is unclear how much time passed between Strong learning of defendant’s arrest and when he called Turner. The prosecution further argues that the fact that Strong was crying and upset about defendant being arrested does not necessarily make the statements admissible as excited utterances. The prosecution further contends that the admission of the statements would not make a different result probable on retrial because, weighing Riddick’s testimony against Turner’s testimony regarding Strong’s alleged statements, a jury would not reach a different verdict.

With regard to the lapse of time between the event and the statement, the Michigan Supreme Court has stated:

Though the time that passes between the event and the statement is an important factor to be considered in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. It is necessary to consider whether there was a plausible explanation for the delay. Unlike MRE 803(1), the present sense impression exception, which requires that the “statement describing or explaining an event or condition [be] made while the

declarant was perceiving the event or condition, or immediately thereafter,” there is no express time limit for excited utterances. “Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.” The trial court’s determination whether the declarant was still under the stress of the event is given wide discretion. [*Smith*, 456 Mich at 551-552 (citations omitted).]

The question is whether the declarant was still under the stress of the event when the statements were made. See *id.* at 552. In order to make such determination, it is necessary to consider the circumstances preceding and surrounding the statement. See *id.*

The prosecution does not dispute that Strong learning of defendant’s arrest was a startling event, but argues that Strong was not under the stress of the event when the statements were made. Although it is unclear how much time elapsed between Strong learning of defendant’s arrest and his conversation with Turner around Thanksgiving 2005, the circumstances surrounding the statement indicate that he was still under the stress of the event when the statements were made. See *id.* According to Turner, Strong was upset and crying. Physical conditions, such as shock and pain, are a consideration in the analysis. *Id.* at 552 n 1. The trial court’s determination that Strong was still under the stress of the event must be given wide discretion. *Id.* at 552. Accordingly, the trial court finding that this statement was part of an excited utterance does not leave us with a definite and firm conviction that a mistake was made.

However, simply being admissible is not the end of the analysis. The evidence must also make it probable that a different outcome would happen on retrial. *Grissom*, 492 Mich at 313. In determining whether the admission of statements would make a different result probable on retrial, it is necessary to consider the credibility of Turner and Strong. See *Cress*, 468 Mich at 692 (considering credibility of confessor); *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994) (“[A] trial court may evaluate the credibility of a witness in deciding a motion for a new trial.”). As the prosecution points out, Turner’s testimony regarding Strong’s statements suffered credibility issues given the length of time she waited to come forward. Further, it is undeniable that Turner saying that her son committed this crime without the assistance of defendant has no practical negative repercussions for her or her son. Strong is now dead and cannot be tried for the murder. Turner admitted that defendant and Strong were “very close friends” who had gone to school for many years together, and she acknowledged having met defendant’s mother several times. Given the circumstances, Turner’s delay in coming forward to provide testimony that exculpates her son’s best friend while incriminating her deceased son is inherently suspect. This Court in *Terrell*, while addressing an analogous situation where a codefendant provides exculpatory testimony for someone else after the codefendant can no longer be tried for the crime, noted that the posttrial testimony of a codefendant who cannot be later tried for that crime (either because already convicted and sentenced or because already acquitted) is patently “untrustworthy.” *Terrell*, 289 Mich App at 565-566. The Court explained that “[codefendants] may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.” *Id.* at 565 (quotation marks and citations omitted). Because Turner did not come forward when Strong reportedly made these statements when he could still have been tried for the crimes, but only

came forward *after* Strong could not be tried, pursuant to *Terrell*, Turner's testimony must be considered highly untrustworthy.

Therefore, since Turner's testimony lacks persuasive value, the trial court clearly erred in finding that the proffered testimony would make a different result probable on retrial.

C. STATEMENT THREE

Lastly, the trial court found that Strong's statement to Pearson on the night of the shooting, where he told her, "Baby, I think I f***ed up our lives," was admissible as an excited utterance.

The prosecution argues that Strong's statement was not admissible as an excited utterance because it shows the possibility of conscious reflection. The prosecution further argues that the admission of the statement would not make a different result probable on retrial because the statement did not exonerate defendant.

However, we need not consider whether the statement was admissible as an excited utterance because it is clear that the statement would not make a different result probable on retrial. As with statement one, Strong's statement to Pearson merely shows that he was involved in the shooting, which is consistent with Riddick's testimony, but does not in any way exonerate defendant. Therefore, the trial court clearly erred in finding that this evidence would make a different result probable on retrial.

D. CONCLUSION

Even assuming that the above statements were admissible as excited utterances, none of them would make a different result probable on retrial. Therefore, the trial court abused its discretion in granting a new trial based on newly discovered evidence.

III. ALTERNATIVE GROUNDS TO AFFIRM

Defendant argues that this Court should also affirm the trial court's decision to grant a new trial because Strong's statements were also admissible as statements against penal interest and Pearson's testimony regarding her observations the night of the shooting constituted newly discovered evidence. A party is not obligated to file a cross-appeal in order to argue alternative grounds for affirmance. *People v Brown*, 297 Mich App 670, 678 n 6; 825 NW2d 91 (2012).

A. STATEMENTS AGAINST PENAL INTEREST

Under MRE 804(b)(3), the following is not excluded by the hearsay rule if the declarant is unavailable:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to

expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Defendant argues that in addition to the three statements discussed earlier, Strong's statements to Turner after learning of defendant's conviction (which the trial court ruled was inadmissible), were admissible as statements against penal interest.

Because defendant could not meet his burden of showing that a different result would have been probable on retrial, we need not consider whether these statements constituted statements against penal interest. For the reasons stated earlier, Turner's testimony, recounting Strong's statements, was inherently suspect. And because of this grave credibility concern, defendant could not meet his burden of showing that a different result would have been probable on retrial. Likewise, his statement to Pearson did not exonerate defendant and would not have caused a different result on retrial. Therefore, defendant cannot show that a new trial was warranted on the basis of this newly discovered evidence.

B. PEARSON'S TESTIMONY

Defendant also argues that Pearson's testimony, detailing what she saw in the parking lot approximately 30 minutes before the shooting, constituted newly discovered evidence warranting a new trial. We disagree.

Again, in order to receive a new trial based on newly discovered evidence, a defendant must show that

"(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." [*Grissom*, 492 Mich at 313, quoting *Cress*, 468 Mich at 692.]

Defendant cannot establish the third and fourth requirements. First, reasonable diligence on defendant's behalf would have discovered this evidence.⁶ The evidence established that the shooting took place "right outside" Pearson's door. The evidence also established that defendant was best friends with Strong and that he knew Pearson. Pearson's apartment, with the shooting being right outside that door, would have been among *the most* likely places to look for witnesses. Defendant obviously knew where the prosecution alleged the shooting occurred. Defendant claims in his brief on appeal that, because Pearson's apartment had no windows facing the parking lot, he "had no reason to believe that Ms. Pearson had witnessed anything."

⁶ We note that the trial court determined that the evidence was not newly discovered because it found that Pearson had an opportunity to come forward. This is the incorrect standard; the correct inquiry is whether defendant, with reasonable diligence, could have discovered the evidence. *Grissom*, 492 Mich at 313.

However, the fact that Pearson had no windows facing the parking lot is not dispositive. As common sense tells us, and as happened here, an apartment's resident could have been outside the unit and seen something related to the shooting. Or, being that close, someone inside simply could have heard relevant evidence. Moreover, defendant knew that Pearson lived there and easily could have made some inquiries to her regarding the events of that night. Simply put, if there were any witnesses to the crime to be located, Pearson, being directly next to the shooting, would have been the logical and reasonable starting place to look. Accordingly, defendant has failed to show how, through reasonable diligence, he could not have discovered this evidence on his own.

Assuming *arguendo* that the evidence was not discoverable through reasonable diligence, the evidence does not make it probable that a different result would happen on retrial. Pearson was only able to identify individuals who were in Strong's Explorer approximately 30 minutes before the shooting. While this evidence is relevant under MRE 401 (evidence is relevant if it has *any* tendency to prove a fact), that is not the threshold to obtain a new trial. The evidence must make a different result *probable* on retrial. *Grissom*, 492 Mich at 313. Even Strong, who everyone now admits was one of the shooters, was not present at the Explorer when Pearson walked by it. Thus, Pearson's testimony that defendant also was not present 30 minutes before the shooting simply does not carry enough weight to permit a conclusion that the introduction of this evidence would have resulted in a different outcome at trial.

Reversed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder